the precise form in which the instrument ought to be drawn up; and (e) the mistake must be one of expression only. A written contract or a deed may be rectified even if the parties can no longer be restored to the position occupied when the contract was made, and even though the mistake has been embodied in a deed of conveyance. Extrinsic and even parol evidence will be admitted to ascertain the true intent of the parties, notwithstanding that the contract is one which is required to be under seal or one which the Statute of Frauds requires to be evidenced by writing.

The question, however, is whether the rules of equity pertaining to rectification apply to lands registered under the local land law, in view of the provision in section 42 of the F.M.S. Land Code (now section 340 of the National Land Code) that the title of a registered proprietor of any land shall be indefeasible except in any case of fraud or misrepresentation to which such registered proprietor was a party or privy. There is ample authority for the proposition that they do apply. In *Loke Yew* v. *Port Swettenham Rubber Company, Limited* [8] it was held by the Privy Council that, apart from the exception in section 7 of the Registration of Titles Regulation, 1891 (the terms of which were similar to section 42 of the F.M.S. Land Code or section 340 of the National Land Code), as the rights of third parties did not intervene, the respondents could not better their position by obtaining registration under circumstances which made it not honest to do so, and that it was the duty of the court to order rectification. In *Wilkins and Others* v. *Kannammal and Anor.*[9] it was held by the Court of Appeal that the *Torrens Law* is a system of conveyance; it does not abrogate the rules of equity; it alters the application of particular rules of equity but only so far as necessary to achieve its own special objects.

In *Lim Hong Shin* v. *Leong Fong Yew*,[10] Edmonds J.C. said:

"The general principle applicable in cases of rectification on account of mistake is set out in section 31 of the Specific Relief Enactment (since replaced by section 30 of the Specific Relief (Malay States) Ordinance, 1950). The mistake must be common to all parties, and there must be very clear evidence of the real intention. When these conditions exist the court may rectify the instrument so as to express the real intention so far as this can be done without prejudice to rights acquired by third parties in good faith and for value. These principles are applicable to instruments or registers relating to all land, whether it be held under Part III of the Land Enactment or the Registration of Titles Enactment; sections 74 and 75 of the latter Enactment provide for rectification of mistake. In this respect, in my opinion, there is no reason to distinguish the two Enactments."

Section 32 of the Specific Relief (Malay States) Ordinance, 1950 states:

"In rectifying a written instrument, the court may enquire what the instrument was intended to mean, and what were intended to be its legal consequences, and is not confined to the enquiry what the language of the instrument was intended to be."

For the reasons I have stated I am satisfied that it is open to this court to order notional rectification of the agreement in this case and the transfer executed in pursuance of that agreement by ordering the defendant to re-transfer the land held under E.M.R. 5339 for Lot 3660 in the Mukim of Setapak on repayment of the purchase price, the expenses in connection with the original transfer and any money which he has spent on improving the land. In my opinion, the defendant has spent no money on improving the land. As I have already stated, I reject his wife's evidence that she spent large sums of money to have the trees on the land cut down and for improving the land. She has stated in her evidence that she did not go back to the land after 1958 because she was told that if she did, she would be stabbed to death. The purchase price of the land at $450 per acre was less than $225. I would add to that a sum of $25 as the amount which might have been spent in connection with having the transfer stamped and registered. The order will therefore be that on payment of a sum of $250 by the plaintiffs into court the defendant do execute a registrable transfer in favour of the 2nd and the 7th plaintiffs, Teo Kim Choon and Teo Boon See (f), as representatives and that, in the event of his failure to do so within a month after the money has been paid into court, the senior assistant registrar of this court do execute such registrable transfer on behalf of the defendant. The defendant will have to pay the costs of the action.

Order accordingly.

Solicitors: *Skrine & Co.; Dato' S. M. Yong & Co.*

SIM YAN HOO v. MATU AND DARO DISTRICT COUNCIL

[O.C.J. (Lee Hun Hoe J.) August 19, 1966]

[Sibu — Civil Application No. 1 of 1966]

Administrative Law — Certiorari — Amendment of licence by District Council — Ultra vires power of District Council — No opportunity given to licensee to be heard.

In this case the Matu and Daro District Council had purported to vary the terms of a boat hawker's licence issued to the applicant. Complaints had been received against the applicant and the council directed that he should not be permitted to trade in certain kampongs. No opportunity was given to the applicant to be heard before the decision was made.

Held: the applicant had shown that the District Council had acted *ultra vires* and had infringed the rules of natural justice and therefore the order for *certiorari* should be granted.

Cases referred to:—

(1) *Maradana Mosque Trustees* v. *Mahmud* [1966] 2 W.L.R. 921 at p. 928.

(2) *R.* v. *Manchester Legal Aid Committee* [1952] 1 All E.R. 480, 487.

(3) *R.* v. *London County Council* [1931] 2 K.B. 233.

(4) *R.* v. *Electricity Commissioners* [1924] 1 K.B. 171.

(5) *R.* v. *Minister for Health, ex parte Davis* [1929] 1 K.B. 619.

(6) *R.* v. *Woodhouse* [1906] 2 K.B. 501, 512.

(7) *Sharp* v. *Wakefield* [1891] A.C. 173.

MOTION FOR ORDER OF *CERTIORARI.*

George Seah for the applicant.

Yee Kon Yeow for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe J.: This is a motion for an order of *certiorari* to bring up and quash the decision of the Matu and Daro District Council to prevent the applicant from trading at Kampongs Bruit, Tekajong and Penyipah.

The applicant has been a boat hawker for some years. He held a licence issued to him by the Matu and Daro District Council to trade in various Kampongs such as Bruit, Tekajong, Penyipah and Sungei Daro. Before him his father had been trading in these places for some 40 years. The licence was renewable each year. His licence for 1965 had been renewed. The licence was issued under the Local Authority Ordinance (Cap. 117) and therefore subject to the provisions of the said Ordinance and by-laws made thereunder. It appeared that following some complaints the finance and general purposes committee of the Matu and Daro District Council recommended on September 14, 1965 that the applicant should not be allowed to trade in all kampongs except Sungei Daro. On September 28, 1965 the full council confirmed the recommendation of the said committee.

By a letter dated October 5, 1965 to the applicant the secretary of the council informed him *inter alia,* that —

"At a recent meeting, it has been decided that your licence as a boat hawker is not permitted to trade in Kampong Bruit, Tekajong and Penyipah on receipt of this notice as there has been complaints against you."

The applicant contended that the council had no jurisdiction to alter terms and conditions of the licence; and that if the council had jurisdiction the decision is contrary to natural justice as the applicant was not given a reasonable opportunity of being heard.

It was not disputed by the council that the decision to amend the applicant's licence was based on certain complaints. The secretary said that complaints were made by the *wakil tua kampong* of Penyipah and two other persons that the applicant's brother wanted to fight them and instigated trouble and that the boat hawker always stayed at Penyipah for long periods. Certain councillors took up the matter and urged the council to cancel the licence. It seems strange that these councillors should request the secretary not to record their complaints in the minutes of the meeting of the committee. Lord Pearce in *Maradana Mosque Trustees* v. *Mahmud* [1] stated:—

"When an applicant is applying to quash an order on the ground that there was an infringement of the rules of natural justice he is not confined to the face of the record. He may establish his case from other reliable evidence."

Subsequently on the advice of the secretary the committee recommended amendment to the licence to prevent the applicant from trading at Kampongs Bruit, Tekajong and Penyipah and allowing him to trade at Kampong Sungei Daro only. But the secretary was unable to say under what particular provision of the local authority legislation the committee or the council had acted to amend the licence.

By-Law 8 of the Matu and Daro District Council (Hawking) By-Laws* made under section 30 of the Local Authority Ordinance reads:—

"8. The following conditions shall attach to licences issued to hawkers who, in the course of their hawking, transport or store their goods in boats —

(a) the licence shall be brought to the office of the council for endorsement at least once in every six months;

(b) the boat shall be brought for inspection to such place and at such intervals as shall be endorsed on the licence;

(c) no licensee shall spend more time at one *pangkalan* or at one native village than that specified in the licence;

(d) no licensee having visited a *pangkalan* or a native village shall, after departure therefrom, return thereto until after the lapse of such time as may be specified in the licence;

(e) no licensee shall store trade goods in any native house;

(f) no licensee shall erect any building for the purpose of storing his trade goods;

(g) no licensee shall trade with a boat without at least one assistant or companion."

No endorsement of any kind was made on the applicant's licence to enforce conditions (b), (c) and (d). Neither was there any special condition attached to the licence. No specific power was conferred on the council by the said by-laws to amend or alter the terms or conditions of a licence during the currency of the licence.

It is true that local authorities are given certain general powers to issue licences in respect of any trade business or undertaking and to control, regulate, supervise or restrict such by by-laws under section 25 of the Local Authorities Ordinance. Subsections (2) and (5) of the said section indicate that the legislature has given

* Laws of Sarawak 1958 Edn., vol. XII p. 1109.

licensees certain amount of protection and they read as follows:—

"(2) Subject to the provisions of the appropriate by-laws a local authority may, at its discretion, issue or refuse to issue a licence under this section:

Provided that any person aggrieved by any such refusal may appeal to the Minister who may confirm or reverse the decision of the authority.

(3) . . . . . .

(4) . . . . . .

(5) A local authority may suspend or revoke any licence issued by it under this section if it is satisfied that the licensee has been guilty of a breach of any of the conditions under which the licence is held:

Provided that no order shall be made under this subsection unless the licensee has been given a reasonable opportunity of being heard."

The court will have to decide whether the council had jurisdiction to do what it did and whether the council had acted contrary to the rules of natural justice. It is unfortunate that the respondent was not represented by counsel. However I did invite counsel for applicant to argue whether the action of the council was not administrative rather than judicial. This is important to decide whether the remedy of *certiorari* will lie or not.

It is not in dispute that the council was a body of persons having legal authority to issue licences. In this case is there a duty on the council to hear the applicant before it made its decision?

In *R.* v. *Manchester Legal Aid Committee* [2] Parker J. (as he then was) referred to what Scrutton L.J. said in *R.* v. *London County Council.* [3]

"An argument has been addressed to us, supported by a number of *dicta* in cases where the question was not raised, that this procedure of the theatres committee was not in any way a judicial act, but was an administrative act, and that if, in administration, they were doing a thing which they had no power to do, the writ of *certiorari* was not the proper means of questioning that action of theirs, though it was a usurped jurisdiction. Now in the early days of licensing there have been authorities bearing one way and the other, on the question whether the action of licensing justices is a judicial act, so that *certiorari* may lie, or is an administrative act, so that *certiorari* will not lie. The writ of *certiorari* is a very old and high prerogative writ drawn up for the purpose of enabling the Court of King's Bench to control the action of inferior courts and to make it certain that they shall not exceed their jurisdiction; and therefore the writ of *certiorari* is intended to bring into the High Court the decision of the inferior tribunal, in order that the High Court may be satisfied whether the decision is within the jurisdiction of the inferior court. There has been a great deal of discussion and a large number of cases extending the meaning of 'court'. It is not necessary that it should be a court in the sense in which this court is a court; it is enough if it is exercising, after hearing evidence, judicial functions in the sense that it has to decide on evidence between a proposal and an opposition; and it is not necessary to be strictly a court; if it is a tribunal which has to decide rights after hearing evidence and opposition, it is amenable to the writ of *certiorari;* and I do not discuss further the nature of the writ, because very elaborate discussions of it will be found in the recent cases of *R.* v. *Electricity Comrs.* [4] and *R.* v. *Minister of Health, Ex. p. Davis.* [5] As far as licensing is concerned, whatever doubts there were in the early stages of the proceedings — and there were many doubts — since the case of *R.* v. *Woodhouse* [6] it is quite clear that every proceeding of magistrates or confirming authorities in granting new or renewing old licences is in the nature of a court, excess of jurisdiction in which can be dealt with by the writ of *certiorari;* and the procedures in granting licences under the Cinematograph Act, and proceedings consequential thereon, appear to me to stand exactly on the same footing as the proceedings of magistrates or confirming authorities dealing with licences for public houses."

In *R.* v. *Woodhouse* [6] where it was held that *certiorari* would lie to bring up and quash an order made by licensing justices, Vaughan Williams L.J. stated:—

"I ask myself, therefore, the question whether the licensing justices in granting or refusing a licence do a judicial act. In my opinion the grant or refusal of such a licence is a judicial act, and the judgment of Lord Halsbury in *Sharp* v. *Wakefield* [7] seems to be an authority for this view; for he says, as appears on p. 179 of the report ([1891] A.C. 173) that 'an extensive power is confided to the justices in their capacity as justices to be exercised judicially, and discretion means, when it is said that something is to be done within the discretion of the authorities, that something has to be done according to the rules of reason and justice, not according to private opinion, according to law and not humour; it is to be, not arbitrary, vague, and fanciful, but legal and regular'. This view seems to me to be confirmed by old and recent decisions. It is impossible to read under the title *'Certiorari'* in Burn's Justice of the Peace the list of the cases in which a writ of *certiorari* has been granted and the grounds for granting it without seeing that in practice a *certiorari* has issued in cases in which it is impossible to say that there was a court and a *'lis'*."

I think it is not unfair to say that the council being a licensing authority should be regarded in the same position as the English licensing justices. It is obvious that the council acted on the complaints of certain people. There is also evidence to indicate business jealousy. In other words they heard one side only. It is true that his licence had not been revoked. But the amendment made was such as to curtail the usefulness of the licence to such an extent almost amounting to a revocation. The right of the applicant to trade in those kampongs had been taken away from him arbitrarily. Council in ascertaining facts or law involving the right of a person may be under a duty to act judicially not withstanding that its proceedings have none of the formalities of and are not in accordance with the practice of a court of law. It may well be that applicant was at fault but that is not in issue. What is in issue is that he had not been given a reasonable opportunity to answer his accusers. In the circumstances the council had infringed the rules of natural justice.

It does not seem surprising that the council was unable to indicate to the court under what particular provision of the Local Authority Ordinance or other relevant legislation which purports

to give it such power. Local authorities do not have unlimited power. The powers of local authorities are defined in the Local Authority Ordinance and subsidiary legislation made thereunder. No rules, regulations or by-laws made under the Local Authority Ordinance must go beyond or be repugnant to the Ordinance under which they are made. Where the law is silent with regard to any particular power the council should be cautious in its action. For it may find itself acting *ultra vires*. In my view that is what precisely happened in this case.

From the evidence the applicant has shown that the council had acted *ultra vires* and also infringed the rules of natural justice. Accordingly an order for *certiorari* will be granted and the decision of the Matu and Daro District Council preventing applicant from trading at Kampong Bruit, Tekajong and Penyipah will be quashed. Costs to applicant to be taxed.

Order for certiorari granted.

RE GURBACHAN SINGH'S APPLICATION

[O.Cr.J. (Yong J.) August 24, 1966]

[Alor Star — Criminal Application No. 6 of 1966]

Criminal Law and Procedure — Habeas corpus — Applicant serving sentence passed by court — Habeas corpus not available — Criminal Procedure Code (Cap. 6), ss. 365 to 375.

The applicant had been sentenced for corruption to 9 months imprisonment and a fine of $446. His appeal to the High Court had been dismissed. The application was made for a writ of *habeas corpus*, the ground being that the president of the sessions court had wrongly convicted him because he had wrongfully refused to admit in evidence a police enquiry paper. It was also alleged at the hearing of the application that the order for retrial of the applicant which had been made in the previous proceedings was defective as the judge in ordering a retrial had not set aside the order of acquittal.

Held: a writ of *habeas corpus* cannot be granted to a person who is serving sentence passed by a court of competent jurisdiction.

Cases referred to:—

(1) *Ex parte Corke* [1954] 2 All E.R. 440.

(2) *Gurdit Singh* v. *Public Prosecutor* [1933] M.L.J. 224.

(3) *Re William Oswald Featherstone* (1954), 37 C.A.R. 146.

(4) *Re Wring and Re Cook* [1960] 1 W.L.R. 138.

CRIMINAL APPLICATION.

Jag-Jit Singh for the applicant.

Harun bin M. Hashim (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Yong J.: The applicant, Gurbachan Singh s/o Harnam Singh, was at all relevant times the Officer in Charge of the Police District of Jitra, Kedah. He was convicted by Mr. Lee, the president of the sessions court, for an offence under section 4(a) of the Prevention of Corruption Act 1961, for corruptly receiving $350, two motor car tyres and two fish, and was sentenced to 9 months imprisonment and fined $446.

The applicant appealed against his conviction and sentence. His appeal was dismissed and his conviction and sentence confirmed by the High Court.

The applicant now applies to the High Court for a writ or *habeas corpus* asking that the body of Gurbachan Singh be produced before the court and if thought fit be then and there released and set at liberty. His ground for the application as stated in his affidavit was that the president of the sessions court had wrongly convicted him because he had wrongly refused to admit into evidence the file containing Police Enquiry Paper (Traffic) No. 236/63.

It may be noted that the question of the admission or non-admission of the said file has been fully discussed and dealt with by the High Court in the applicant's appeal against his conviction and sentence in Alor Star criminal appeal No. 83 of 1964*, pages 1, 2, 3, 4 and 23 of the High Court's judgment.

In my view the proper or improper admission or non-admission of evidence by the trial court in convicting an accused person is not a good ground for granting *habeas corpus*. *Habeas corpus* is not a means of appeal against conviction and sentence. If convicted persons are not satisfied with the trial court's judgment, their remedies lie in their appeal to the High Court, the Federal Court or even to the Privy Council if they can. *Habeas corpus* should not be used as a means of appeal. I respectfully agree with the judgment of Lord Goddard C.J. in *re Ex Parte Corke* (1) where his Lordship said that:—

> "*Habeas corpus* is not a means of appeal. If they (convicted persons) complain that they are wrongly convicted, they should appeal to Quarter Sessions. A person convicted by a competent court of summary jurisdiction cannot apply for a writ of *habeas corpus* and the affidavit here shows that William Corke is in prison serving a sentence passed by the Bow Street magistrate's court under the Vagrancy Act 1824. It has always been the law . . . . that a writ of *habeas corpus* is a writ of right and not a writ of course . . . . That means that before a writ can issue or leave can be given to apply for a writ, an affidavit must be before the court showing some ground on which the court can say that the applicant is unlawfully detained. In this case, it is perfectly clear that, unless the conviction was set aside by a Court of Appeal, he is lawfully in custody serving a lawful sentence and his application for a writ of *habeas corpus* is therefore refused."

At the hearing of this application Mr. Jag-Jit Singh raised another point which was not raised in the applicant's affidavit. He said that the applicant was originally charged before Mr. Somasundram, the learned president of the

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* [1966] 2 M.L.J. 125